

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARK T. MURRAY,

Plaintiff,

v.

ROBERT WILSON,

Defendant.

Case No. C07-5238FDB

REPORT AND
RECOMMENDATION

**NOTED FOR:
JULY 13, 2007**

This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and MJR 4. The court screened this complaint and entered an order directing plaintiff to amend or show cause why the action should not be dismissed (Doc. # 5). That order gave plaintiff until June 15, 2007, to respond. There has been no response as of June 19, 2007. The court now recommends this action be dismissed prior to service.

DISCUSSION

When a complaint fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(e). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984)). In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. Parratt

1 v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327
 2 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements
 3 are present. Haygood v. Younger, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020
 4 (1986).

5 When a person confined by the state is challenging the very fact or duration of his physical
 6 imprisonment, and the relief he seeks will determine that he is or was entitled to immediate release or a
 7 speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Preiser v.
 8 Rodriguez, 411 U.S. 475, 500 (1973). In June 1994, the United States Supreme Court held that "[e]ven a
 9 prisoner who has fully exhausted available state remedies **has no cause of action under § 1983 unless**
 10 **and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of**
 11 **a writ of habeas corpus.**" Heck v. Humphrey, 512 U.S. 477, 487 (1994)(emphasis added). The court
 12 added:

13 Under our analysis the statute of limitations poses no difficulty while the state challenges are
 14 being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for
 15 damages attributable to an unconstitutional conviction or sentence does not accrue until the
 16 conviction or sentence has been invalidated.

17 Id. at 489. "[T]he determination whether a challenge is properly brought under § 1983 must be made
 18 based upon whether 'the nature of the challenge to the procedures [is] such as necessarily to imply the
 19 invalidity of the judgment.' *Id.* If the court concludes that the challenge would necessarily imply the
 20 invalidity of the judgment or continuing confinement, then the challenge must be brought as a petition for a
 21 writ of habeas corpus, not under § 1983." Butterfield v. Bail, 120 F.3d 1023, 1024 (9th Cir.1997)
 22 (*quoting Edwards v. Balisok*, 520 U.S. 641 (1997)). The complaint fails to state a cause of action under 42
 23 U.S.C. § 1983.

24 Here, plaintiff seeks damages from a police officer following a traffic stop, search, and arrest.
 25 Plaintiff attempts to challenge the grounds for the stop. Were plaintiff to prevail, the decision would call
 26 into question the propriety of his current incarceration. Plaintiff fails to state a claim and must proceed in
 27 habeas corpus.

28 CONCLUSION

Plaintiff's action fails to state a claim as a matter of law. The action should be **DISMISSED**
WITHOUT PREJUDICE. A proposed order accompanies this report and recommendation.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the
2 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ.
3 P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v
4 Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to
5 set the matter for consideration on **June 13, 2007**, as noted in the caption.

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7 DATED this 19 day of June, 2007.

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9 /S/ J. Kelley Arnold
10 J. Kelley Arnold
United States Magistrate Judge
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